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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1943

No. 634

KENNETH M. KEEFE AND WALLACE D. BRADFORD,
Appellants,

vs.

EARL L. CLARK, DRAIN COMMISSIONER OF OAKLAND COUNTY, MICHIGAN, AND BOARD OF SUPERVISORS OF OAKLAND COUNTY, CITY OF ROYAL OAK,
Intervenor.

APPEAL FROM THE SUPREME COURT OF THE STATE OF MICHIGAN.

STATEMENT AS TO JURISDICTION.

PAUL W. VOORHIES,
Counsel for Appellant.

VOORHIES, LONG, RYAN & MCNAIR,
Of Counsel.

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SUPREME COURT OF THE UNITED STATES

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KENNETH M. KEEFE AND WALLACE D. BRADFORD,
Appellants,

vs.

EARL L. CLARK, DRAIN COMMISSIONER OF OAKLAND COUNTY, MICHIGAN, AND BOARD OF SUPERVISORS OF OAKLAND COUNTY, CITY OF ROYAL OAK.

STATEMENT OF BASIS OF JURISDICTION.

The appellants in the above entitled cause, pursuant to Rule No. 12 of the Rules of the Supreme Court of the United States, file this their statement showing the basis upon which they contend that the Supreme Court of the United States has appellate jurisdiction to review on appeal the judgment of the Supreme Court of the State of Michigan in the above entitled cause.

A. Statutory Provision Believed to Sustain Jurisdiction.

The statute believed to sustain appellate jurisdiction is Section 344, Subdivision (a) of Title 28—Judicial Code and Judiciary, of the United States Code, U. S. C. A. Sec.

237 (a) Judicial Code, as amended, which provides that a final judgment or decree in any suit in the highest court of a State in which a decision in the suit could be had, where is drawn in question the validity of a statute of any State, on the ground of its being repugnant to the Constitution of the United States, and the decision is in favor of its validity, may be reviewed by the Supreme Court upon appeal.

B. Statutes of the State of Michigan, Validity of which Is Involved.

In said cause the validity of the following statutes of the State of Michigan was drawn in question, on the ground that certain provisions thereof are, as to petitioners, repugnant to Article I, Section 10, of the Constitution of the United States, in that they impair the obligation of pre-existing contracts as embodied in bonds of East Clawson Storm Sewer Drain District held by petitioners.

The statutes drawn in question are:

(a) Act 114 of Michigan Public Acts 1937 (pages 180-183) as amended by Act 282, Michigan Public Acts 1939, (pages 540-545) and Act 234, Michigan Public Acts 1941 (pages 357-386).

(b) Act 155 of Michigan Public Acts 1937 (pages 238-244), as amended by Acts Nos. 29, 244 and 329 of Michigan Public Acts 1939 (pages 49, 453-457 and 848, respectively) and Act 363 of Michigan Public Acts of 1941 (pages 638-650).

(For convenience in referring to same, these will be called herein "the statutes of 1937.")

The pertinent provisions thereof are summarized as follows:

Act 114 of 1937, with amendments, provides for a different form of decree to be entered in tax sale proceedings than that which had previously been prescribed, and directed what effect should be given thereto. It provided that

the decree should direct the sale of delinquent tax lands and that if no bid therefor was received they should be bid in to the State, in which case, after a period of redemption, title to such lands should be absolute in the State, and all taxes and special assessments which are charged against or are liens upon such lands, and other liens and encumbrances against same of whatever kind or nature, shall be cancelled as of such date.

Act 155 of 1937, with amendments, is popularly known as the "Scavenger Sale Law." It provides that land, title to which has vested in the State by virtue of an unredeemed bid by the State under a sale in accordance with the decree referred to above, shall be sold at auction to the highest bidder, with the right of the prior owner to match the highest bid and buy on deferred payments. The minimum bid permitted is 25% of the assessed valuation as fixed and determined at the last assessment for the year preceding the vesting of title in the State of Michigan (Sec. 7).

The effect of a deed made pursuant to such sale is stated thus:

> "The board having jurisdiction is authorized for and on behalf of the State of Michigan to execute with the seal of the board attached such quit claim deeds, land contracts, leases or other contracts, documents or papers as may be necessary to carry out the provisions of this act. Any quit claim deed or deeds executed by the board or department shall convey title in fee to land under the provisions of this act, free from any encumbrances, including all taxes and special assessments which were cancelled by the decree pursuant to which the State obtained title * * *" (Sec. 9.)

Disposition of the funds obtained on the sale is directed as follows:

> "All moneys received by the State Land Office Board * * * under the provisions of this act, * * *

shall be credited to the general fund of the State, and after first deducting such commissions and maintenance costs as are authorized in sections 4 and 8 of this Act, shall be paid to the several county treasurers who shall remit the same to the several taxing units * * * in proportion to the delinquent taxes and special assessments of such units cancelled against any description of land sold under the provisions of this Act * * *. Such cancelled taxes and special assessments shall be deemed to include all taxes and assessments assessed or levied against said lands prior to the vesting of title in the State of Michigan." (Sec. 10.)

In brief summary, the meaning of these statutes as construed by the Supreme Court of Michigan, as applied to the situation in this case, is as follows: A parcel of land which has been tax delinquent for a specified period is offered for sale; if it is not redeemed or sold, title passes to the State and all existing liens and encumbrances are cancelled. It must thereafter be sold by the State Land Office Board, a state agency, at public auction, and at such sale a bid must be accepted if it is not less than 25% of the last assessed valuation, and the parcel then passes into private hands, often the hands of the prior owner, and is then exempt from any future levy of a deficiency assessment to pay the bonded debt of a drain district which, were it not for the 1937 statutes, would have to be levied against it.

C. Date of Judgment Sought to Be Reviewed and Date Upon Which Application for Appeal Is Presented.

The date of judgment sought to be reviewed is October 11, 1943. Application for an appeal from the aforesaid judgment to the Supreme Court of the United States, together with assignment of errors and this jurisdictional statement, was presented on the 9th day of December, 1943, to the Honorable Emerson Boyles, Chief Justice of the Supreme Court

of the State of Michigan, who on said date denied said petition and on the 16th day of December, 1943, appellants' petition for appeal, accompanied by their assignments of error and this statement of basis of jurisdiction, was presented to the Honorable Stanley Reed, Associate Justice of the Supreme Court of the United States.

D. Nature of Case and Rulings of Lower Court Bringing Same Within Jurisdictional Provisions Relied Upon:—Cases Believed to Sustain Jurisdiction.

This case involves a claim that legislation passed subsequent to the issuance of bonds by a state agency impairs the obligation of contracts embodied in the bonds and is, therefore, repugnant to Article I, Section 10, of the Constitution of the United States.

Petitioners, as holders of bonds of a Michigan district, contend that they are entitled to have enforced those laws which were in effect at the time the bonds were issued, which provide for tax levies sufficient to provide funds for the discharge of the bonded debt of such drain district, and that a combination of subsequently enacted statutes construed by the court to mean that such taxes cannot be levied, and that the issued bonds must go unpaid, constitutes such impairment of contract obligations as is forbidden by the constitutional provision above specified.

A drain district in Michigan is organized by proceedings detailed in Title XI, Michigan Compiled Laws 1929, Volume I, pages 1894 to 1955. The County Drain Commissioner conducts the proceedings, levies assessments to provide funds for the construction of drains, and may in behalf of the district issue bonds in advance of the collection of such assessments. Assessments are levied upon the basis of benefit, and the parties assessed may include counties, townships, cities and villages. Such assessments against municipalities are

called "at large assessments." An assessment may be divided into a number of annual installments, but the total assessment is declared to be a perpetual lien against the lands assessed until paid. (Sec. 4927, Michigan Compiled Laws 1929.) The assessment is based upon an apportionment of benefits made by the Commissioner in which he determines the percentage of the cost of the project which must be borne by each parcel of land in the district and the municipalities to be taxed at large. (Section 4895 id.) Additional assessments must be made in case the original amount assessed is insufficient for any cause which is apportioned on the same basis as the first assessment, and the Commissioner is obliged to make such additional assessment when the bonds have all fallen due and the amount in the drain fund is insufficient to pay the principal and interest thereon. The amount to be levied must be sufficient to make up the deficiency. (Sections 4917 and 4940 id.) Drain taxes must be collected in the same manner as state or other general taxes. (Sections 4927 and 4928 id.) The Board of Supervisors of the county must spread on the general tax rolls the assessments made by the Drain Commissioner. Sections 4924, 4925 id.)

At the time these bonds were issued the law in relation to the sale of lands against which there were delinquent taxes merely provided (Section 3459, Michigan Compiled Laws 1929) that the decree in tax sale proceedings should direct their sale by the County Treasurer. Subsequent sections provided that the bid must be for the amount of the delinquent taxes, interest and penalties, and if no bid was received the land must be bid in by the State, in which case the taxes assessed remained a lien upon the lands, but any person could purchase same from the State, (Section 3462 id.) at subsequent annual tax sales (Section 3471 id.) or from the auditor general, but always at a price sufficient to pay

the original tax, with penalties and interest (Section 3477 id.) Neither the sale of state tax lands, nor the sale of any of the bids of the state for which the time of redemption had not expired, would in anywise prejudice the right to enforce the collection of any tax subsequent to the year or years for which the same has been sold as aforesaid, and for the taxes and charges remaining unpaid for said subsequent year or years. (Section 2478 id.) After delinquency for five years, lands bid off to the state for the taxes of one or more of such years, (no application having been made to redeem or proceedings taken to set aside the taxes or remove the cloud occasioned thereby,) were deemed abandoned and could be deeded to the state. (Section 3520 id.) In that case all taxes charged against such lands in the office of the auditor general at the time they are deeded to the state are cancelled, the state, county and township bearing the share of the loss on such taxes that properly belongs to each, and lands so deeded were not subject to assessment for any purpose until they were again sold and deeded by the state, and notice of said sale given to the county treasurer by the commissioner of the state land office. (Section 3524 id.) As to exemptions, the law at the time these bonds were issued provided (Section 3390 id.) "that all property, real and personal, within the jurisdiction of this state, not expressly exempted, shall be subject to taxation." Lands exempted were "(1) all public property belonging to the United States, (2) all public property belonging to the State of Michigan, except licensed homestead land, part paid lands held under certificates, and lands purchased at tax sales and still held by the state, (3) lands owned by any county, township, city, village or school district * * * used for public purposes." (Section 3395 id.) Certain other lands not necessary to mention here were exempt from general taxes, but not from special assessments for public improve-

ments. In re. Auditor General's Petition as to 1938 Tax Sale, 300 Mich. 80.

Petitioners, as purchasers of these bonds, were thus assured by statutes governing their issue that the original assessments pledged for their payment should remain a perpetual lien until paid, and that after all bonds of the issue had matured an additional deficiency assessment would be made in an amount sufficient for their payment, and, even in case of lands delinquent for five years and deeded to the state as abandoned lands, only such taxes against them would be cancelled as were charged in the office of the auditor general at the time they were deeded to the state. When the state by deed restored the land to private ownership, it was subject to all taxes and assessments which the state or its subordinate instrumentalities could cause to be levied, including deficiency drain assessments. Furthermore, additional deficiency assessments must be in amount sufficient to pay the bonds and all interest thereon, so that any loss caused by any land not being subject to tax would be made up by remaining lands and governmental units taxed at large.

Rulings of the lower court bringing the case within jurisdictional requirements relied on occurred in the following manner: Petitioners alleged in their pleading that they were entitled to have the laws existing at the time of the issuance of their bonds enforced and, therefore, prayed that the court enter a declaratory judgment requiring respondents to levy a full deficiency assessment. They further alleged that laws subsequently passed operating to remove the security for their payment were repugnant to Article I, Section 10, of the Constitution of the United States. In paragraph 5 of their petition they stated "that nothing contained in Act 155, Michigan Public Acts of 1937, as amended, or any other statutes in pari materia, abrogated or curtailed such provisions," (i.e. those relating to a de-

ficiency assessment,) "or could as against petitioners or other holders of bonds of said district abrogate or curtail the same, and that any interpretation of same in the manner contended by respondents would violate Article I, Section 10 * * * of the Constitution of the United States."

The trial judge ruled that lands sold under Act 155, Public Acts 1937, were exempt from an additional deficiency levy, and because of the large area thus exempted, no deficiency levy could be made.

Briefs filed in the Michigan Supreme Court argued the proposition that if the laws enacted in 1937 were given the construction which forbade a full deficiency assessment, they are repugnant to Article I, Section 10, of the Federal Constitution. (Appellants' brief, pp. 23-33, Appellees' brief, pp. 9 to 11, Appellants' reply brief, p. 7.)

The Michigan Supreme Court shows by its opinion that it recognized the necessity of deciding the question of whether the 1937 statutes, as it interpreted them, were in conflict with Article I, Section 10, of the Constitution of the United States. It stated the contention of petitioners thus, on page 508 of the official report, (Volume 306 Michigan Reports):

> "They (petitioners) contend that if the act is construed to exempt such lands from deficiency assessments, it does so in violation of the impairment of obligation clauses of the State and Federal Constitutions. They further contend that, even if such lands are exempt, the remaining lands and the municipalities against which the original assessment was spread at large are still subject to an additional tax for the purpose of retiring the unpaid drain bonds."

On page 510 it further said:

> "In considering appellants' argument with respect to the impairment of the obligations of the contract,

it is important that the underlying causes leading to the legislation, which appellants now attack, be fully comprehended and understood."

"We need not repeat the history of this legislation which is detailed in Baker v. State Land Office Board, 294 Mich. 587, 592 et seq., and which is quoted in our Birmingham decision. The impairment argument was presented in both the Baker and the Birmingham cases and denied in each decision."

After referring to the provision of Act 155, Michigan Public Acts 1937, which provides that each taxing unit shall be paid its pro rata share of the proceeds of the sale, the court says that "were it not for this act, under the then existing circumstances, the lands would have been rendered valueless for further revenue purposes because of accumulated delinquent taxes, and the bondholders would have realized nothing from their lien. We cannot, therefore, say that the bondholders' contract has been impaired when they received the maximum benefit under the circumstances."

A quotation is made from the opinion of this court in *Municipal Investors Assn.* v. *Birmingham*, 316 U. S. 153, and the court adds:

"If the lands were again subject to a deficiency assessment, after sale to the State and conveyance by it to a third party, the possibility of the restoration of this property to the tax rolls would be considerably lessened because prospective buyers might well hesitate to assume such an obligation."

It concludes its reasoning on the point relating to the impairment question by quoting from *Home Building and Loan Assn.* v. *Blaisdell*, 290 U. S. 398, as follows:

"The economic interests of the state may justify the exercise of its continuing protective power, notwithstanding interference with contracts."

Petitioners believe that the decision of the Supreme Court of Michigan unjustly deprives them of rights guaranteed by Section 10, Article I, of the Constitution of the United States, and to an extent which is substantial, in that it forces them to bear the loss occasioned by subsequently enacted legislation in the following respects: (1) It deprives them of the right to a deficiency assessment against lands which are privately owned and otherwise subject to taxes, (2) it does not place upon other lands and the municipalities taxed at large the burden of making up fund deficiencies to the full extent as guaranteed by the law under which the bonds were issued. Removal of these resources for their payment of petitioners' bonds must inevitably result in their obtaining but a small portion of the moneys promised in said bonds.

It is an unwarranted assumption, entirely without support in the record, that the 1937 statutes afford bond holders the maximum benefit under the circumstances. It is true they receive a portion of the original assessment which was unpaid at the time the land was bid off to the state, but they are entitled to an additional levy upon such land when it is privately owned, just as holders of bonds of other municipal corporations having jurisdiction to tax said lands are entitled to the levy of taxes thereon for the purpose of raising money to pay their bonds. There is no ground to suppose that if such lands were not made exempt by such statutes as the court construes them, the owners thereof would not pay the deficiency assessment.

This court has not in the case of *Municipal Investors Assn.* v. *City of Birmingham*, 316 U. S. 153, ruled upon the federal questions here involved. It declined to do so for the reason that the charter of the Village of Birmingham, which was there invoked, did not require the deficiency assessment which was claimed. Since this court in that case held that Municipal Investors Association had no contract requiring

the levy of a deficiency assessment, it did not and could not pass upon the moot question of whether there would be an impairment of contract, if one existed. In the instant case the drain law unquestionably requires the deficiency assessment which petitioners seek. In prior decisions, notably *W. B. Worthen Co.* v. *Kavanaugh*, 295 U. S. 56, and cases there cited, this court has held that a state may not by subsequent enactments so reduce the tax resources for the payment of municipal debts that a large part thereof must go unpaid.

We believe that the Michigan Supreme Court has erroneously interpreted this court's decision in *Home Building & Loan Association* v. *Blaisdell*, 290 U. S. 398. We do not understand it to go so far as to say that a legislature is free to impair contract obligations whenever in its judgment such impairment seems advisable in the public interest. Such an interpretation would nullify the constitutional provision.

Petitioners, therefore, represent that the questions involved herein are of a substantial nature and should be decided by this court. *Hamilton* v. *Regents of University of California*, 293 U. S. 245, 258; *Senn* v. *Tile Layers Protective Union*, 301 U. S. 468, 476-7; *Millsaps College* v. *City of Jackson*, 275 U. S. 129, 132.

Cases believed to sustain the jurisdiction are the foregoing, *W. B. Worthen Co.* v. *Kavanaugh* (*supra*), Mem. Opinion 293 U. S. 624; *Hamilton* v. *Regents of University of California* (*supra*); *Senn* v. *Tile Layers Protective Union* (*supra*); *Millsaps College* v. *City of Jackson* (*supra*). The judgment of the Supreme Court of the State of Michigan, which is the highest court in said state in which a decision in said suit could be had, was a final judgment, although it remanded the case to the lower court with directions to enter judgment in accordance with its opinion, since said

lower court had no further questions in the case to be decided. *Board of Commissioners* v. *Lucas,* 93 U. S. 108; *Mower* v. *Fletcher;* 114 U. S. 127; *Rio Grande & W. Ry. Co.* v. *Stringham,* 239 U. S. 44. Furthermore, a proceeding for a declaratory judgment is a suit within the meaning of Section 344, Sub. (a) of Title 28—Judicial Code and Judiciary of the United States Code Annotated, Section 237a, Judicial Code. *Nashville, Cincinnati & St. L. Ry. Co.* v. *Wallace,* 288 U. S. 249.

Attached hereto and marked Exhibit A is a true copy of the judgment of the Supreme Court of the State of Michigan sought to be reviewed. Exhibit B is a true copy of the opinion of said court upon the rendering of said judgment, and Exhibit C is a true copy of the opinion of the Circuit for the County of Oakland, rendered before the entry of its judgment.

Wherefore, petitioners submit that the Supreme Court of the United States has jurisdiction of this appeal.

PAUL W. VOORHIES,
VOORHIES, LONG, RYAN & MCNAIR,
Attorneys for Petitioners & Appellants,
2046 Penobscot Building,
Detroit, Michigan.

Dated: December 16, 1943.

EXHIBIT A.

At a Session of the Supreme Court of the State of Michigan, Held at the Supreme Court Room, in the Capitol, in the City of Lansing, on the eleventh day of October, in the year of our Lord one thousand nine hundred and forty-three.

Present the Honorable Emerson R. Boyles, Chief Justice; Bert D. Chandler, Walter H. North, Raymond W. Starr, Howard Wiest, Henry M. Butzel, George E. Bushnell, Edward M. Sharpe, Associate Justices.

42415.

KENNETH M. KEEFE, and WALLACE D. BRADFORD, *Plaintiffs and Appellants,*

vs.

EARL L. CLARK, Drain Commissioner of Oakland County, and BOARD OF SUPERVISORS OF OAKLAND COUNTY, *Defendants.*

The record and proceedings in this cause having been brought to this Court by appeal from the Circuit Court for the County of Oakland, and the same, and the grounds of appeal specified therein, having been seen and inspected and duly considered by the Court, and it appearing to this Court that in said record and proceedings, and in the giving of judgment in said Circuit Court, there is NO ERROR, Therefore it is ordered and adjudged that the judgment of said Circuit Court for the County of Oakland be and the same is hereby in all things modified and affirmed, and the cause remanded to the Court below for the entry of a judgment in conformity with the opinion filed herein. It is further ordered that no costs be awarded herein.

STATE OF MICHIGAN, ss:

I, Jay Mertz, Clerk of the Supreme Court of the State of Michigan, do hereby certify that the foregoing is a true and correct copy of an order entered in said court in said cause; that I have compared the same with the original, and that it is a true transcript therefrom, and the whole of said original order.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of said Supreme Court at Lansing, this 7th day of December, in the year of our Lord one thousand nine hundred and forty-three.

JAY MERTZ,
Clerk.

[SEAL.]

EXHIBIT B.

STATE OF MICHIGAN, SUPREME COURT

JUNE TERM, 1943

Filed October 11, 1943

KENNETH M. KEEFE and WALLACE D. BRADFORD, *Petitioners-Appellants,*

v.

EARL L. CLARK, Drain Commissioner of Oakland County, and BOARD OF SUPERVISORS OF OAKLAND COUNTY, *Respondents-Appellees.*

Before the Entire Bench

BUSHNELL, J.:

Petitioners Keefe and Bradford have appealed from a declaratory judgment which determined that respondents, Drain Commissioner and Board of Supervisors of Oakland County, are not obligated, by § 18, chapter X of Act No. 316, Pub. Acts 1923, as amended by Act No. 331, Pub. Acts 1927, and Act No. 129, Pub. Acts 1939, 1 Comp. Laws 1929, § 4940 (Stat. Ann. § 11.104), to levy an additional assessment to cover the deficiency in a drain tax. Petitioners are the owners of bonds, which are a part of an original issue in 1927, of $300,000, to finance the construction of the East Clawson Storm Sewer Drain.

This improvement was held to be a legal drain and the assessment, therefore, valid in Villiage of Clawson *v.* Van-Wagoner, 268 Mich. 148. The original assessment roll was

payable in annual installments from 1928 to 1937, inclusive, and was levied as follows: 77.5 per cent. against lands in the drainage district; 3.5 per cent. against the county at large; 2.5 per cent. against Township of Troy; 6.5 per cent. against the Township of Royal Oak; and 10 per cent. against the Village of Clawson. All of the bonds had matured by May 1, 1938, and as of December 31, 1941, $33,440 was due for interest and $223,000 for principal.

The assessment installments were levied for four years from 1927 to 1931, and then discontinued. In 1937, in contemplation of a refunding arrangement, a supplemental roll was prepared spreading the remaining six installments of principal over a period extending from 1937 to 1961, and the accumulated interest over a ten year period. The failure to levy after 1931 was due to a large tax delinquency. During 1939 and 1940 about 47 per cent. of the lands in the district were bid in by the State at tax sales. How much of these lands have since been returned to private ownership is not disclosed by the record. Before negotiations between the bondholders and the drain commissioner were consummated, the case of Municipal Investors Association v. City of Birmingham, 298 Mich. 314, was decided on June 30, 1941. Respondents contended that this decision was authority for the proposition that lands in the drainage district which passed through a "scavenger sale" became exempt from any deficiency assessment for unpaid drain taxes. The parties held the refunding plan in abeyance pending decision of the Supreme Court of the United States in the Birmingham appeal, which decision was rendered on April 27, 1942, and reported in 316 U. S. 153, 62 S. Ct. 975, 86 Law Ed. 1341. This case was commenced June 25, 1942.

Petitioners in the instant case argue that the action of the Supreme Court of the United States in the Birmingham case was inconclusive of their rights, and that it became necessary for them to resort to declaratory judgment proceedings in the state courts. The circuit judge held that our decision in the Birmingham case was conclusive of the issues involved, and that lands sold by the State Land Office Board, under the provisions of Act No. 155, Pub. Acts 1937, Mason's Cum. Supp. 1940, § 3723-1 et seq. (Stat. Ann.

§ 7.951 et seq.), were not subject to a deficiency assessment, and since a large portion of the lands in the district were lost to the possibility of reassessment, a deficiency assessment upon the remaining lands which had not been sold for delinquent taxes was "contrary to all the established principles of uniformity and equality in assessment as guaranteed by the Constitution," in that such an assessment "would be a tax having no relationship to benefit."

Appellants now argue that lands which have been sold to the State for delinquent taxes are not exempt from the deficiency assessment after their resale by the State, and that, if the act in question provides for such an exemption, it is in violation of Section 9 of article X of the Constitution of 1908, which reads:

"The power of taxation shall never be surrendered or suspended by any grant or contract to which the state or any municipal corporation shall be a party."

They also contend that, if the Act is construed to exempt such lands from deficiency assessments, it does so in violation of the impairment of obligation clauses of the State and Federal Constitutions. They further contend that, even if such lands are exempt, the remaining lands and the municipalities against which the original assessment was spread at large are still subject to an additional tax for the purpose of retiring the unpaid drain bonds.

The section of the General Drain Law, upon which petitioners rely, reads in part:

"If there is not sufficient money in the fund in a particular drain at the time of the maturity of the bonds last to mature to pay all outstanding bonds with interest, whether such insufficiency is due to the anticipation of installments as provided in the preceding section, or to failure to sell any lands for delinquent taxes, or to any other cause, it shall be the duty of the commissioner to at once levy an additional assessment as hereinbefore provided in such an amount as will make up the deficiency." 1 Comp. Laws 1929, § 4940, as amended by Act No. 129, Pub. Acts 1939 (Comp. Laws Supp. 1940, § 4940, Stat. Ann. 1942, Cum. Supp. § 11.104).

The general drain law must be read and construed together with the general property tax law of the State for the reason that:

"All drain taxes assessed under the provisions of this act shall be subject to the same interest and charges, and shall be collected in the same manner as state and other general taxes are collected, and collecting officers are hereby vested with the same power and authority in the collection of such taxes as are or may be conferred by law for collecting general taxes. * * *." General drain law (chap. 10, § 5, 1 Comp. Laws 1929, § 4927 (Stat. Ann. § 11.91).

The general property tax law, § 67, 1 Comp. Laws 1929, § 3459, as last amended by Act. No. 234, Pub. Acts 1941 (Comp. Laws 1942, § 3459, Stat. Ann. 1942 Cum. Supp. § 7.112), provides that the final decree for the sale of lands assessed shall contain, among other provisions, the following:

"It is further ordered, adjudged and decreed that title to each parcel of land ordered in this decree to be offered for sale, and which parcel of land is bid in at such sale to the state, shall become absolute in the state of Michigan on the expiration of the period of redemption from such sale, and all taxes, special assessments, which are charged against or are liens upon such parcel, and other liens and encumbrances, against such parcel, of whatever kind or nature, shall be cancelled as of such date."

The law further provides in the State Land Office Board Act (Act No. 155, § 9, Pub. Acts 1937, as amended by Act No. 363, Pub. Acts 1941 (Comp. Laws Supp. 1943, § 3723-9), Stat. Ann. 1942 Cum. Supp. § 7.959):

"Any quitclaim deed or deeds executed by the board or department shall convey title in fee to land under the provisions of this act, free from any encumbrances, including all taxes and special assessments which were cancelled by the decree pursuant to which the state obtained title."

The latter act was discussed in Municipal Investors Association *v.* City of Birmingham, 298 Mich. 314, and those

members of the court who concurred in the opinion of Mr. Justice Sharpe held that "anything is an incumbrance which constitutes a burden upon the title," and that "it would naturally follow that the possibility of reassessment would constitute an incumbrance and thus be cancelled."

Appellants argue that the Birmingham case may be distinguished on its facts and is not conclusive of the issues involved in the instant appeal because the legislature, by its amendment to §67 of Act No. 206, Pub. Acts 1893, (1 Comp. Laws 1929, §3459, Stat. Ann. §7.112), effective June 16, 1941, indicated that only those "special assessments which are charged against or are liens upon such parcel," are to be cancelled, and not deficiency assessments which never had been charged against the land, and were not, therefore, liens at the time of sale. We are unable to agree with this argument. The decree of sale provided, as required by statute, that "other liens and incumbrances against such parcel of whatever kind or nature shall be cancelled as of such date." Our Birmingham decision is authority for the proposition that the possibility of reassessment would constitute an incumbrance, and is, therefore, cancelled.

In considering appellants' argument with respect to the impairment to the obligations of the contract, it is important that the underlying causes leading to the legislation, which appellants now attack be fully comprehended and understood.

We need not repeat the history of this legislation, which is detailed in Baker *v.* State Land Office Board, 294 Mich. 587, 592 et seq., and which is quoted in our Birmingham decision. The impairment argument was presented in both the Baker and the Birmingham cases and denied in each decision.

The statute, Act No. 155, §10, Pub. Acts 1937, as amended by Act No. 363, Pub. Acts 1941 (Comp. Laws Supp. 1942, §3723-10, Stat. Ann. 1942 Cum. Supp. §7.960), provides that, after the sale of property by the State Land Office Board, each tax assessing unit shall be paid its pro rata share of the proceeds of the sale. The bondholders' maximum security was thus realized after the tax lien was foreclosed

when the subsequent sale of the property was consummated. Were it not for this act, under the then existing circumstances, the lands would have been rendered valueless for further revenue purposes because of accumulated delinquent taxes, and the bondholders would have realized nothing from their lien. We cannot, therefore, say that the bondholders' contract has been impaired when they received the maximum benefit under the circumstances. As said by the Supreme Court of the United States in the Birmingham appeal:

"If the stated powers of the Village to levy an assessment on improvement district property required that the lots assessed, after sale for default in their installments, should be subject to an additional assessment to cover such deficiencies, the burden might depress their value to a point where little if anything could be realized for the bondholders, and successful sales for nonpayment would be frustrated. This would clearly be true where, as here, a very large proportion of the assessment were defaulted."

To this we add the observation that, if the lands were again subject to a deficiency assessment, after sale to the State and conveyance by it to a third party, the possibility of the restoration of this property to the tax rolls would be considerably lessened because prospective buyers might well hesitate to assume such an obligation.

The rule that existing laws are read into contracts, in order to establish the obligations between the parties, is subject, however, to the well-known reservation of the essential attributes of the sovereign power, and this reservation must also be read into contracts as a postulate of the legal order. Baker *v.* State Land Office Board, 294 Mich. 587. As stated by the Chief Justice in Home Building & Loan Association *v.* Blaisdell, 290 U. S. 398, 437, 78 Law Ed. 413, 428:

"The economic interests of the State may justify the exercise of its continuing and dominant protective power notwithstanding interference with contracts."

The act does not, as appellants argue, surrender the taxing power as prohibited by section 9 of article X of the

Michigan Constitution, because the lands in question are subject, from the time that the purchaser's bid is accepted by the State Land Office Board, to all taxes, other than those extinguished by the tax sale. Wilson *v.* City of Pontiac, 294 Mich. 79. That portion of the act cancelling taxes is a valid exercise of the police power. The State's immunity from taxation on the lands while held by it is in no way passed on to the subsequent individual purchaser of these lands from the State.

Appellants contend that, if it be held that the deficiency assessment cannot be levied against lands purchased from the State, that it can, nevertheless, be levied against those lands which have not been sold for delinquent taxes and against those municipal units against which a proportion of the original assessment had been spread at large.

The trial judge determined that such assessment would violate the uniformity clause of the Constitution. If the entire amount of the deficiency assessment were spread against such lands and taxing units, the argument would be logical and sound. However, it is only fair and reasonable that such lands and municipalities continue to bear their just proportion of the cost of improvement originally imposed. The act does not cancel incumbrances on lands that have not been sold for delinquent taxes nor those portions of the special assessments which were spread at large against the several municipalities.

A deficiency assessment should be spread and there should be deducted from 77.5 per cent. of the total deficiency that portion which would have been applicable to lands in which the State acquired absolute title under delinquent tax sales, and the remainder of the 77.5 per cent. should be spread against lands not sold under that act. 22.5 per cent. of the deficiency assessment should be spread as follows: 3.5 per cent. against the county at large, 2.5 per cent. against the Township of Troy, 6.5 per cent. against the Township of Royal Oak, and 10 per cent. against the Village of Clawson.

This determination is in accord with the general principle stated by Mr. Justice Holmes in Gast Realty & Investment Co. *v.* Schneider Granite Company, 240 U. S. 54, 60 Law Ed. 522.

"The legislature may create taxing districts to meet the expense of local improvements, and may fix the basis of taxation without encountering the 14th Amendment unless its action is palpably arbitrary or a plain abuse. * * * But * * * if the law is of such a character that there is no reasonable presumption that substantial justice generally will be done, but the probability is that the parties will be taxed disproportionately to each other and to the benefit conferred, the law cannot stand against the complaint of one so taxed in fact."

The declaratory judgment entered in the circuit court is modified and affirmed, and the cause is remanded for the entry of a judgment in conformity with this opinion. The question being a public one, no costs will be allowed. It is so ordered.

EXHIBIT C.

Opinion of the Circuit Court for the County of Oakland in Keefe, et al., v. Earl L. Clark, Drain Commissioner, et al. (Filed December 16, 1942).

Petitioners as holders of bonds of the East Clawson Drain District seek a declaratory judgment to determine the obligation of the respondent drain commissioner to impose a deficiency assessment upon all the lands as determined benefited in the drain district.

An interesting factual circumstantial background, unessential of narration as a prerequisite of determination, is that out of an issue of bonds dated November 1st, 1927 in the principal sum of $300,000 to finance the cost of construction there remains due and unpaid the sum of $223,000 plus accrued interest from May 1st, 1939. The cost of improvement was distributed in these percentages: the district 77.5%; County of Oakland at large 3.5%; Township of Troy at large 2.5%; Township of Royal Oak at large 6.5% and Village, now City of Clawson at large 10%.

Proofs offered in the case show that 65% of the lands in the district are either retained or have been sold by the state as tax delinquent land, subject to the provisions of

the Scavenger Sale Act, being Act No. 155 of Public Acts of 1937 as amended.

Respondents offer objection to a spread of the deficiency assessment, stating it is a factual and legal impossibility. The principal objection is that the aforementioned 65% of the lands in the district retained or sold by the state under Act No. 155 of Public Acts of 1937 as amended are not subject to the levy of such a deficiency assessment in the interpretation of Municipal Investors Association v. City of Birmingham, 298 Mich. 314.

Observations are here made in an endeavor to form an opinion based upon logical deductions. Bondholders acquire securities through a contract with the issuing unit of government within the confines of the law existent at time of issue.

The phraseology of Section 18, Chapter 11 of Act No. 331 of Public Acts of 1927 referred to as Section 4940 of Compiled Laws of 1929, M. S. A. 11.104 as amended by Act No. 129 Public Acts of 1939, a pertinent statute as of the date of issue of the bonds reads as follows, "If there is not sufficient money in the fund in a particular drain at the time of the maturity of the bonds last to mature to pay all outstanding bonds with interest, whether such insufficiency is due to the anticipation of installments as provided in the preceding section, or to failure to sell any lands for delinquent taxes, or to any other cause, it shall be the duty of the commissioner to at once levy an additional assessment as hereinbefore provided in such an amount as will make up the deficiency. Any surplus remaining after the payment of the bonds and interest shall remain in the county treasury and be used for the maintenance of the drain."

Respondent county evidences concern over the provision of Section 4937 of the Compiled Laws of 1929 providing that, "In case the amount available in the drain fund shall be insufficient to pay the principal or interest of any such bonds heretofore issued when they become due, the same shall be advanced and paid by the county out of its general funds and reimbursement to said general fund shall be made out of the drain taxes collected: Provided, That such advancement by the county shall not cause the

total debt of the county to exceed the constitutional limitation thereof," and asks that it be construed as not making the bonds a general obligation or as pledging the full faith and credit of the county for their retirement. The question is vital to the ultimate full retirement of the bonds, but is not one of the objectives of the declaratory judgment sought by the petitioners.

Yielding to a hoped pardonable temptation, some comment is here made on the intriguing issue without an attempt at solution pronouncement. It is made to elicit interest of others vitally concerned not here litigant. The section is now repealed and the wisdom of its enactment apparently repudiated. The provision requiring advancement was held a sustainable legislative imposition incident to the act of the issuance of the bonds. Moore v. Harrison, 224 Mich. 512. The rights and duties of a county are not based upon contractual relations. They are organized for public purposes and their powers, rights and duties may at any time be modified or abolished by legislative action. Township of Clearwater v. Board of Supervisors of Kalkaska County, 187 Mich. 516. This gives legislature right to dictate the application of general funds on hand raised for a public purpose as interpreted in University of Michigan v. Pray, 264 Mich. 693. The advance provision was there held a remedial mandatory right. It was held not subject to avoidance as to an interim issue by a change of the remedial provision in Whitman v. Township of Royal Oak, 269 Mich. 146. Some logic may be found in recognizing, in the furtherance of a public purpose, an issuing unit of government to facilitate sale of special assessment bonds, may agree to advance from its general fund sums for payment in event of a special assessment fund deficiency.

It is exceeding troublesome to find the limitation on advancement that must logically exist. It is stated in the case of the Township of Royal Oak v. City of Pleasant Ridge, 295 Mich. 284, to advance does not transform special assessment bonds into general obligation bonds or change their character. The cited cases seem to indicate the county is not relieved from advancing by reason of the fact that certain lands in the assessment district are lost through

tax sale and there is no chance reimbursement and that advance is not predicated upon the possibility of reimbursement. May advance then be interpreted as a word implying general obligation liability carrying the full faith and credit of the county? If this is true the general fund of the county must meet the assault of hundreds of special assessment bond holders attacking for funds they obviously will never receive from special assessment accounts.

The drain commissioner in establishing a drain project is not the agent of the county. He is performing a special statutory duty for the drain district. Section 4937 of the Compiled Laws of 1929 providing for the payment of special assessment bonds out of the general fund in event of a deficiency does not establish county liability. These are the holdings of Brooks v. County of Oakland, 268 Mich. 637. The problem of advancement resulting in a general obligation was left for further consideration in Township of Royal Oak v. Pleasant Ridge supra. When a case is established, as may be possible with the East Clawson Drain District, that exceeding county liability ensues through the hopelessness of reimbursement, that the orderly functions of county government are imperiled through advancement, that the county is building projects of great magnitude for the restricted benefit of a few at the expense of all, the limitations on advancement, here suggested as logically existing, may be found. If advancement from the general fund does not carry the necessity of a general levy to pay a deficiency, the problem may be over-emphasized. Nevertheless, repeated demands for payment out of the general fund creates an aggravating situation not conducive to the orderly process of government.

This court for determination of issues raised by petitioners, in compliance with Act No. 36 of the Public Acts of 1929, Section 13903-13905, Compiled Laws of 1929, offers this opinion. The availability of lots sold under Act No. 155 of Public Acts of 1937 as amended for a deficiency assessment under Act No. 331 of Public Acts of 1927 as amended must be viewed in the reflected light of Municipal Investors Association v. City of Birmingham supra. It was there held that the purchasers of bonds are assumed

to have purchased with knowledge that the lien for payment upon the properties securing the taxes and assessment may be discharged. A new chain of title originates free from any incumbrances. Anything is an incumbrance which constitutes a burden upon the title of property. The possibility of reassessment for the benefit is a liability held to constitute an incumbrance. A drain tax is a lien from the time there is an assessment for benefit. A warranty deed obligated the grantor to payment even though the tax could not have been paid at the time the deed was given. Lindsay v. Eastwood, 72 Mich. 333. It is here pointed out that Section 4939 of Compiled Laws of 1929 specifically states that payment in full of drain tax is a payment in full in light of possible reassessment. Reassessment must be predicated upon the basis of benefit.

This case is controlling. Lands sold under Act 155 of Public Acts of 1937 as amended are not subject to a deficiency reassessment. Under this holding, 65% of the lands in the district are lost to the possibility of reassessment.

The right to have a deficiency assessment spread against the remaining 35% of the lands in the district has not been presented sufficiently to justify a determination that would under all possible eventualities be applicable. The parties in interest in the district are not here represented. Many questions involving their rights have not been raised. At the time of hearing of objections as to the necessity of the project, the law contained no provision for a deficiency assessment, except as contained in Section 18, Chapter 10 of Act 316 of Public Acts of 1923 which omitted phraseology of Section 18 of Chapter 10 of Act 331 of Public Acts of 1927 providing for the levying of such an assessment due to the failure to sell any lands for delinquent taxes. Such a provision was enacted in the interim between that time and the issuance of the bonds. This may have a material effect upon the rights of the parties. The regular special assessment for the retirement of the bonds was not levied for a period of several years. The interest of those paying may have been prejudiced thereby effecting their reassessment obligation. Sums may have been lost through such

inaction that would have otherwise been obtainable. The remedy of reassessment was not sought promptly upon the maturity of the bonds. A deficiency assessment upon the remainder of the property in the district which did not pass through the Scavenger Sale is contrary to all the established principles of uniformity and equality in assessment as guaranteed by the constitution as pointed out by the intervenor City of Royal Oak. "Special assessments or special taxation, therefore, is lawful and constitutional only when founded upon specific benefits accrued from the improvement for which the tax or assessment is laid. In other words, the test in all special taxation or assessment proceedings which is constantly invoked by the courts, is that the assessment should not exceed the special benefit to the property." McQuillin Municipal Corporations, 2nd Edition, Vol. 5, page 576. "Special Assessments shall not be levied in excess of the benefits conferred, whether by valuation, front foot area, or any other method. Norwood *vs.* Baker, 172 U. S. 269, 277, 288." "Obviously local assessment or special taxation laws cannot ignore constitutional restrictions or guarantees, as due process of law, equal protection of the law, or permit taking private property without just compensation." McQuillin Municipal Corporations, 2nd Edition, Section 2167. Such an assessment would be a tax having no relationship to benefit and is not valid special assessment levy.

There should be funds available from lots sold and those that may be sold under Act No. 155 of Public Acts of 1937 as amended to materially alter and reduce the amount of the deficiency. It seems illogical to believe that lots in this section of the metropolitan area have sold and will be sold if the matter of sale is judiciously handled, for sums materially less than the determined beneficial improvement tax. It would seem that by legislative action or otherwise, application of funds so received should be to the retirement of the bonds. Other functions of government have succeeded in operation and application of a part of the proceeds thereto does not seem essential. They are most benefited by a return of the property to the tax rolls to support the present operation of govenment.

The provision for a deficiency assessment was enacted to cover a normal condition, not such an abnormal one as here presented. An attempt at reassessment on the basis of the percentage of benefit allocated to each parcel, if legally possible, with the exclusion of the excepted Scavenger Sale lots would not accomplish the retirement of the bonds. It would only accomplish confiscation of property. Any attempt at reassessment should at all events be predicated upon a determination that the same is not an idle act for it is well establishel legal axiom that courts will not order nor direct acts of this nature. Obviously for the reasons here enumerated it is determined, on the showing here made, that a deficiency assessment upon the remaining portion of the district omitting the area embraced in the lots sold under Act No. 155 of Public Acts of 1937 as amended may not be made.

GEORGE B. HARTRICK,
Circuit Judge.

Dated: December 16, 1942.